92-922

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In The

Supreme Court of the United States

October Term, 1993

JAMES POLK and MATTIE POLK,

Petitioners,

VERSUS

DIXIE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party may exclude all blacks from a jury based purely upon subjective reasons (improper eye contact).

2. Whether, under the rule of *Batson v. Kentucky*, 476 U. S. 79 (1986), a party is required to give non-racial reasons related to the particular case to be tried before it may peremptorily challenge minority members of a jury.

3. Whether, in view of the apparent impossibility of disproving purely subjective, non-racial reasons given for excluding black members from a jury, this Court should abolish peremptory challenges.

4. Whether, the rule of *Batson v. Kentucky*, supra, permits a litigant to exclude all minority members from a jury panel for reasons the party does not specifically recall, but simply on the basis that counsel's general practice is to exclude jurors who do not make proper eye contact.

5. Whether, consistent with *Batson v. Kentucky*, a party may successfully utilize purely subjective reasons (improper eye contact) to exclude all minority members from a jury.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 972 F. 2d at 83 (5th Cir. 1992), and is included as an Appendix to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on August 4, 1992. This Court has jurisdiction to review by Writ of Certiorari, under 28 USC 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Fourteen, which requires "equal protection of the laws".

STATEMENT OF THE CASE

Black Plaintiffs, James L. Polk and Mattie B. Polk, filed suit in the Circuit Court of Marshall County, Mississippi alleging that the Dixie Insurance Company issued an insurance policy on James L. Polk's 1981 Cadillac and refused payment when the automobile burned. R., Vol. 1, pp. 8-10.

Invoking diversity of citizenship jurisdiction, Dixie Insurance Company removed the case to the United States District Court for the Northern District of Mississippi. R., Vol. 1, pp. 1-4. The removal had the effect of greatly diminishing the prospects of Plaintiffs' having any blacks on a jury, since Marshall County, Mississippi is predominantly black, but the venue site of the United States District Court for the Northern District of Mississippi at Oxford is overwhelmingly white.

Dixie Insurance Company answered the suit claiming that James Polk had intentionally burned his own automobile. R. Vol. 1, pp. 44-58.

The parties were tendered a jury panel consisting of all whites, except two blacks. The attorney for the Dixie Insurance Company exercised two of her three peremptory challenges on these only two prospective black jurors. R., Vol. 4, pp. 1-42.

The District Court denied the request of Plaintiffs' attorney that the Dixie Insurance Attorney be required to state a non-racial reason for excluding both of the blacks from the jury. R., Vol. 4, pp. 29-31.

The all white jury heard all white witnesses on behalf of Dixie Insurance, and all black witnesses on behalf of the Polks.

James Polk testified that the insured automobile was destroyed by fire, when he went to sleep at the wheel during the early morning hours of July 30, 1986. The car accidentally ran off the highway, crashed and burned. R., Vol. 4, p. 96.

On the other hand, the Defendant insurance company presented testimony by a white volunteer fire chief, R., Vol. 4, p. 164, and

its white arson expert, R., Vol. 4, pp. 183-186, that in their opinion, the car was deliberately burned.

The insurance company bolstered racial aspects of the case by asking Polk about his illegitimate children. R., Vol. 4, pp. 105-106.

The all white jury resolved the factual issue in favor of Dixie Insurance. R., Vol. 5, p. 300, R., Vol. 2, p. 490.

On April 11, 1990, the Fifth Circuit affirmed, holding that *Batson v. Kentucky*, 476 U. S. 79 (1986), does not apply to civil suits between private parties. *Polk v. Dixie Ins. Co.*, 897 F. 2d 1346-47 (5th Cir. 1990). This Court reversed. *Polk, supra*, ___ U. S. ___, 115 L. Ed. 2d 965, 111 S. Ct. 2791 (1991).

The Fifth Circuit, on remand, directed the District Court to conduct a hearing as to whether Polk had made a "prima facie" case of racial discrimination, and if so, whether Dixie Insurance Company could show that its challenges were made for non-racial reasons. 943 F. 2d 553 (5th Cir. 1991).

The District Court then held a hearing on the issue of racial motivation for excluding all blacks from the jury. At the hearing, Dixie's attorney testified she did not recall her actual reasons for the decision to remove the only two black jurors from the panel. Rather, defense counsel explained it was counsel's general practice to exclude jurors based on eye contact. Counsel explained the eye contact reasoning as follows;

> "I mean, it is like a blank stare. I can tell you in this instance that in all honesty, I do not have specific details that I can independently recollect because this has been approximately three or four years ago now that I did it.
>
> Therefore, I can tell the Court for sure that the element of eyeball contact is the turning factor in every decision I made in every case that I tried."

R., Vol. 6, pp. 7-8.

District Judge Biggers upheld the challenges. He stated that re-

quiring the trial court to "conduct a little mini-trial in chambers as to why peremptory challenges were exercised....is a ridiculous burden to start placing on the trial courts", R., Vol. 6, p. 22, and that the Court was "reluctant to take the authority away from a lawyer to make a decision". R., Vol. 6, p. 29.

On August 4, 1992, the Fifth Circuit affirmed, holding:

> "We cannot say that eye contact necessarily is a phoney reason when it is proffered as justification for removal of all black jurors...."

Court of Appeals Opinion, p. 7.

ARGUMENT I.

THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT'S PERMITTING PARTIES TO PEREMPTORILY CHALLENGE ALL MINORITY MEMBERS ON A JURY PANEL, FOR PURELY SUBJECTIVE REASONS (LACK OF EYE CONTACT) NOT RELATED TO THE PARTICULAR CASE TO BE TRIED, IS INCONSISTENT WITH THIS COURT'S DECISION IN *BATSON V. KENTUCKY*, 476 U. S. 79, AND MAKES THE PROTECTION OF *BATSON V. KENTUCKY* ILLUSORY.

The factual scenerio presented in this case is simple. The black Plaintiffs have been deprived of any black members on their jury panel when the defense attorney excludes jurors for subjective reasons (improper eye contact) which cannot possibly be rebutted and which have no relationship to the particular case to be tried.

Had the Fifth Circuit followed specific directives in *Batson*, Dixie could not have removed all blacks from the panel.

The *Batson* majority, through Justice Powell said:

> "nor may the prosecutor rebut the Defendant's case merely by denying that he had a discriminatory motive or affir-

> ming his good faith in making individual selections....If these general assertions were accepted as rebutting a Defendant's prima facie case, the equal protection clause 'would be but a vain and illusory requirement'....The prosecutor, therefore, must articulate a neutral explanation related to the particular case to be tried...."

476 U. S. at 98.

Here, Dixie's attorney did not articulate a neutral explanation *related to the "particular case to be tried"*. Rather, she articulated the "general assertion" that it is always her practice to exclude jurors who do not make proper eye contact. Such a reason will invariably allow the exclusion of racial jurors in every case to be tried.

The Fifth Circuit acted inconsistently with *Batson's* incorporation of the standard of *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. at 258. *Batson* incorporated *Burdine's* holding that the "neutral explanation" must be "clear and reasonably specific", *Batson*, note 21, and *Burdine* specifies that a reason is not "clear and reasonably specific" unless it is precise enough to provide a target upon which Plaintiff may focus a rebuttal. *Burdine, supra*, n. 20. *Accord, Miles v. M.N.C. Corp.*, 750 F. 2d 867 (11th Cir. 1985); *Bryan v. Sky Chief's, Inc.*, 670 F. 2d 864 (9th Cir. 1982). The "articulated reason" — lack of proper eye contact — is not sufficiently precise to allow Plaintiffs to make a rebuttal. Whether a juror is making "proper eye contact" depends exclusively on the mind of the challenging attorney. Whether the attorney perceived the eye contact as hostile or improper, is entirely in the subjective mind of the attorney.

In short, this Court should grant the Writ to establish that lower courts should not construe *Batson* in such a fashion as to make its protections illusory. Rather, the Fifth Circuit should be directed to follow *Batson's* directive that the explanation offered be "reasonably specific" and "related to a particular case to be tried."

Another reason for granting the Writ is that the Fifth Circuit's holding is inconsistent with approaches taken by other Courts of Appeals. Dixie's attorney admitted that she could not recall the specifics

of the case. Rather, she testified that it was her general practice to exclude jurors based upon eye contact. A failure to recall explanation was held an insufficient articulation of a non-racial reason in *Harrison v. Ryan*, 909 F. 2d 34 (3rd Cir. 1990); *Accord, U. S. v. Cunningham*, 713 F. Supp. 165 (M.D. N.C. 1988).

The Fifth Circuit's approach is also inconsistent with that of the Eleventh Circuit in *Barfield v. Orange Co.*, 911 F. 2d 644 (11th Cir. 1990). *Barfield* differentiated using "body language" as a reason for exclusion, from using "eye contact" as a reason for exclusion. Body language might be clear enough for observation in the courtroom; whereas, eye contact, like counsel's "gut feelings", can be verified by nothing in the record other than counsel's own subjective explanation.

This case is unique in permitting purely subjective reasons to be utilized to exclude *all* members of a racial minority. See *United States v. Chincilla*, 874 F. 2d 695 (9th Cir. 1989) (Fact that all minority members were excluded from jury panel requires court to disallow purely subjectively based challenges.); *United States v. Terrazas-Carrasco*, 861 F. 2d 93 (5th Cir. 1988) (Prosecutor's exclusion of some minority members for subjective reasons allowed when he left some minority members on the jury.); *Roman v. Abrams*, 822 F. 2d 214, 228 (General responses regarding "lifestyle" and "background" are inadequate when utilized to exclude all minority members.); *Moore v. Keller Industries, Inc.*, 948 F. 2d 199 (5th Cir. 1991) (Fact that party left a black on the jury "substantially supports" a finding of no discrimination.)

In a separate opinion in *Batson*, Justice White wrote:

> "Any prosecutor can easily assert facially neutral reasons for striking a juror and trial courts are ill-equipped to second guess these reasons. How is the Court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as the Defendant, see *People v. Hall*, 35 Calif. 3rd 161, 672 P. 2d 854, (1983) or seemed 'uncommunicative', *King, supra*, at 498, or 'never cracked a smile' and therefore, 'did not possess the sensitivity necessary to realistically look at the issues and decide the facts in this case', *Hall, supra*, at 165, 672 P.

> 2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's allegation to justify his strikes on non-racial grounds, then the protection erected by the Court today may be illusional."

If all black jurors may be excluded on the grounds that an attorney subjectively believes that eye contact was improper, Justice White's prophecy that *Batson* will be illusory has been fulfilled. If this decision be allowed to stand, and blacks kept off all juries by an attorney's citing a general practice of excluding jurors based upon eye contact, this Court has wasted much effort in *Batson*. If this decision be consistent with *Batson*, then it is time for this Court to face, head on, the issue debated in *Batson* — whether peremptory challenges should be eliminated. See Opinion of Justice Berger in *Batson*, 476 U. S. 112-115 (lamenting *Batson's* limitations on the peremptory challenge, "one of the most important rights" in our justice system); opinion of Justice Renquist in *Batson*, at 476 U. S. at 122-125 (protesting "unprecedented use of the equal protection clause to reject the historic scope of the peremptory challenge".); and the opinion of Justice White, stating that "ideally", the Court should "ban them (peremptory challenges) entirely", and citing *Swain v. Alabama*, 384 U. S. at 244, for the proposition that when there must be a choice between the right of a Defendant to have a jury chosen in compliance with the equal protection clause, and the right to challenge peremptorily, "the Constitution compels the choice of the former". 476 U. S. at 106.

If this case be consistent with *Batson*, that decision has been much ado about nothing, and only the elimination of peremptory challenges will suffice to afford black citizens the right to have blacks on a jury.

Respectfully submitted,

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No.:

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APPENDIX

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In The

United States Court Of Appeals
For The Fifth Circuit

No. 92-7094
(Summary Calendar)

JAMES L. POLK and
MATTIE B. POLK,

Plaintiffs-Appellants,

versus

DIXIE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Mississippi

(CA-WC-87-43-B-D)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

In this Mississippi diversity case, the Plaintiffs-Appellants James L. and Mattie B. Polk, who are black, appeal the district court's

overruling of their *Batson*[1] objection to the purported discriminatory exercise of peremptory jury challenges by Defendant-Appellee Dixie Insurance Company. Concluding that the findings of the district court were not clearly erroneous, we affirm.

I

FACTS AND PROCEEDINGS

The Polks sued Dixie Insurance Company (Dixie) for insurance policy proceeds claimed for loss of their car and for bad faith denial of their claim. The district court granted summary judgment for Dixie on the Polks' bad faith denial claim. The policy claim was tried to a jury, which likewise found for Dixie.

During voir dire, Dixie exercised two of its three peremptory challenges to remove the only two black persons on the tendered panel, resulting in an all-white jury. The Polks moved the court to require Dixie's counsel to provide a non-racial reason for her exercise of these two challenges. Before Dixie responded, the court denied the motion on the grounds that *Batson's* prohibition of racial use of peremptory challenges did not extend to private parties. On appeal,[2] we affirmed on the basis of our *en banc* opinion in *Edmonson v. Leesville Concrete Co., Inc.*[3] The United States Supreme Court subsequently reversed our *en banc* opinion in *Edmonson* to hold that *Batson* did apply to civil suits between private parties.[4] In the Polks' case, the Court granted certiorari, vacated our judgment, and remanded the case for further consideration in light of *Edmonson*.[5] On remand, we directed the district court to determine whether the Polks had made a prima facie case of racial discrimination and if so, to allow Dixie the opportunity to show nonracial reasons for its exercise of the peremptories.[6]

Pursuant to our instructions, the district court held a hearing.

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

[2] *Polk v. Dixie Ins. Co.*, 897 F2.d 1346 (5th Cir. 1990) *(Polk I)*.

[3] 895 F.2d 218 (5th Cir. 1990).

[4] _____ U. S. _____ 111 S.Ct. 2077, 114 L. Ed.2d 660 (1991).

[5] _____ U.S. _____, 111 S. Ct. 2791, 115 L.Ed.2d 965 (1991).

[6] 943 F.2d 553 (5th Cir. 1991).

After the court found that the Polks had made a prima facie case, Dixie's counsel stated that she could not remember why she had struck the two black jurors, noting that three to four years had elapsed since the 1988 trial of the case. She asserted, however, that eyeball contact must have been the reason because "I can tell the Court for sure that the element of eyeball contact is the turning factor in every decision I make in every case I try." Eyeball contact, she elaborated on cross-examination by the Polks' counsel, "is not just looking at me; it is the expression on their face (sic) when they are looking at me, whether there is a smirk or smile or rolling their eyes; it is the impact of the eyeball contact, if any."

Relying on the trial notes of her assistant, Dixie's counsel proffered secondary reasons. One black member of the venire was an unemployed housewife; Dixie's counsel stated that she generally dismissed unemployed persons and indeed had used her third peremptory in the Polks' case to strike an unemployed white housewife. The other black stricken peremptorily by Dixie worked as an insurance company clerk; defense counsel averred that she always struck persons employed in her client's industry to prevent such person from unduly influencing the jury with their extrajudicial knowledge.

In rebuttal, the Polks presented one of the blacks who had been excluded from the jury, who testified, "I usually look at people when they are talking to me to make sure I can hear what they are saying." At the conclusion of the hearing, the court found that the two black persons had been stricken for non-racial reasons. This appeal followed.

II

ANALYSIS

At trial, proof of a *Batson* claim is a three-step process. First, the complaining party must make a prima facie showing that opposing counsel exercised a peremptory challenge on the basis of race. If that party is successful, the burden shifts to the striking party to articulate a race-neutral explanation for the strike. If the striking party articulates such a reason, the complaining party must show that the reason proffered is pretextual or otherwise inadequate; and the trial court then must determine whether the complaining party has shown the articulated rationale to be pretextual or has otherwise carried the

ultimate burden of proving purposeful discrimination.[7]

On appeal, we turn directly to the ultimate finding of discrimination *vel non* when the striking party has proffered a race-neutral explanation and the trial court has ruled.[8] We review that finding for clear error, according deference to the credibility evaluations which usually inhere.[9] So doing here, we conclude that the district court's finding of no discrimination was not clearly erroneous.

The Polks contend that the confluence of two circumstances precludes a finding that Dixie articulated a race-neutral explanation. One such circumstance is that Dixie's counsel admitted that she had no specific memory of the strikes in dispute. The other is that she offered a subjective explanation — eye contact — as the most likely reason for her strikes.

That a lawyer would forget why he or she had struck particular jurors years earlier is not surprising, especially when the then-controlling law required no reasons. Nonetheless, when an attorney offered virtually nothing beyond, "I do not remember," the Third Circuit in *Harrison v. Ryan*[10] found that the striking party failed to carry its burden. That is not the situation here. Dixie's counsel maintains that she must have relied on eyeball contact because she always does and may have relied on other race-neutral factors in line with guidelines she generally follows. Under similar circumstances, the Eighth Circuit has found the striking party's burden satisfied.[11] We see no reason to take a contrary position in light of the time lapse between juror selection and the *Batson* hearing. When the applicability

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[7] *Hernandez V. New York*, _____U.S._____, 111 S. Ct. 1859, 1865-66, 114 L.Ed.2d. 395 (1991) (plurality), citing *Batson*, 476 U.S. at 96-98, 106 S.Ct at 1722-24; *Moore v. Keller Industries, Inc.*, 948 F.2d 199, 201-202 (5th Cir. 1991), *cert. denied*, _____U.S._____, 112 S. Ct. 1945, 118 L.Ed.2d 550 (1992), *United States v. Clemons*, 941 F.2d 321, 323 (5th Cir. 1991).

[8] *Hernandez*, 111 S.Ct. at 1866; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987).

[9] *Clemons*, 941 F.2d at 325.

[10] 909 F.2d 84, 87 (3rd Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).

[11] *See United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989); *United States v. Wilson*, 867 F.2d 486 (8th Cir.), *cert. denied*, 493 U.S. 827, 110 S.Ct. 92, 107 L.Ed.2d 57 (1989).

of *Batson* is clear at trial and contemporaneous explanation is required, lapse of memory would trigger more serious concerns.

Nevertheless, the Polks argue that Dixie's reliance on an unverifiable subjective consideration such as eye contact casts further doubt on its justification. We disagree. Jurisprudentially, it is too late in the day to contend that eye contact fails to satisfy the striking party's burden of articulating a neutral explanation. Recognizing that "the decision to exercise a peremptory challenge ... is subjective"[12] and often "influenced by intuitive assumptions, "[13] we have explicitly accepted eye contact (or lack thereof) as a legitimate rationale.[14] In the *Batson* context, subjective considerations might not be susceptible to objective rebuttal or verification. We nonetheless permit them because of the inherent nature of peremptory challenges, with the understanding that ultimate *Batson* findings "largely will turn on evaluation of credibility"[15] of counsel's explanation.

The Polks attempt to distinguish our cases accepting eye contact as a neutral explanation by arguing that some black persons remained on the jury in those cases but all were dismissed here. We understand this as an argument that a subjective consideration like eye contact is inadequate to counter the heightened inference of discrimination arising when the striking party accepts no black jurors. We decline to establish such a per se rule. Whether the striking party was or was not motivated by its proffered explanation is a fact-intensive question which must be decided case by case in light of the totality of circumstances.

We cannot say that eye contact necessarily is a phony reason when it is proffered as justification for removal of all black jurors. On the record in this case, the trial court's conclusion that Dixie's counsel was not motivated by racial consideration is a permissible view of the evidence.

---

[12] *Thomas v. Moore*, 866 F.2d 803, 805 (5th Cir.), *cert. denied*, 493 U. S. 840, 110 S. Ct. 124, 107 L.Ed.2d 85 (1989).

[13] *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988).

[14] *Id.*; *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94-95, n. 1 (5th Cir. 1988); *United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987).

[15] *Batson*, 476. U.S. at 98, n. 21, 106 S. Ct. at 1724, n. 21.

Finally, the Polks point to an explanation for the strikes presented by Dixie in an earlier appeal and object to the expansion on that explanation introduced at the *Batson* hearing. *United States v. Romero-Reyna*[16] involved an analogous situation. At a *Batson* hearing conducted on remand, the prosecutor "essentially repeated a fuller version of the explanation offered at the sidebar conference, which had immediately followed completion of jury selection, plus an additional reason for excluding the pipeline operator."[17] There, we deferred to the trial court's assessment of whether the added reason was legitimate and credible. Finding no inconsistency between Dixie's earlier and later explanations, we do the same here.

AFFIRMED.

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[16] 889 F.2d 559 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084, 110 S.Ct. 1818, 108 L.Ed.2d 948 (1990).

[17] 889 F.2d at 562.

(2)

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QUESTIONS PRESENTED

1. Whether the Polks' filing of an improper petition, without service upon or any other form of notice to Dixie Insurance Company within the allowed time, renders the Polks' current petition, which was filed and served outside the established ninety-day time period, improper for consideration.

2. Whether the neutral, non-racial reasons for striking two potential black jurors in this case meet the test established in *Batson v. Kentucky*, 476 U.S. 79 (1986), for peremptory strikes.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioners, James L. Polk and Mattie B. Polk, and the respondent, Dixie Insurance Company.

The Senatobia Bank, the lienholder on Mr. Polk's automobile, was a defendant in the district court but was dismissed by stipulation of dismissal with prejudice on February 17, 1988.

Dixie Insurance Company, now known as Infinity Insurance Company, is a wholly owned subsidiary of the Penn Central Corporation. The Penn Central Corporation is a public stock company, the majority of its stock being owned by American Financial Enterprises.

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No. 92-922

In The

Supreme Court of the United States

October Term, 1992

JAMES L. POLK and MATTIE B. POLK,

Petitioners;

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent Dixie Insurance Company [Dixie] respectfully requests this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The August 4, 1992, opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at *Polk v. Dixie Ins. Co.*, 972 F.2d 83 (5th Cir. 1992). It is attached as an Appendix to the Petition.

Other reported decisions in this case, in reverse chronological order, are as follows:

Polk v. Dixie Ins. Co., 943 F.2d 553 (5th Cir. 1991);

Polk v. Dixie Ins. Co., 111 S. Ct. 2791 (1991); and

Polk v. Dixie Ins. Co., 897 F.2d 1346 (5th Cir. 1990).

JURISDICTION

Although the Polks state that jurisdiction is proper in this case pursuant to 28 U.S.C. § 1254, respondent Dixie Insurance Company contests whether the petition was timely filed and properly served pursuant to 28 U.S.C. § 2101(c) and the Rules of the Supreme Court of the United States. Dixie's argument regarding this issue is set out more fully below in Point I of the Argument for Denying the Petition.

STATEMENT OF THE CASE

The Statement of the Case found at pages 2-4 of the Polks' petition must be supplemented.

At the hearing on remand to determine whether the black members of the jury panel were stricken for non-racial reasons, counsel for Dixie Insurance Company stated that the main reason for her striking the potential jurors at issue was lack of "eyeball contact." (VI R. 8.) Although admitting that she did not remember the exact details, since over three years had passed and the law had not required reasons to be given in civil cases at that

time, on cross-examination by Petitioners' counsel, counsel for Dixie again stated her reason for excluding the potential jurors was lack of eyeball contact.

> Q: And up until today, up until you got up here and gave your statement just now, the only reasons that have ever been assigned by you until right in January of 1992 for excluding these jurors was eyeball contact. Is that not true?
>
> A: That is true then, it is true now, and eyeball contact is the one, and when I said eyeball contact, eyeball contact is not just looking at me, it is the expression on their face when they are looking at me, whether there is a smirk or smile or rolling their eyes, it is the impact of the eyeball contact, if any.
>
> Q: And, so that is your reason as of right now for excluding the jurors, eyeball contact?
>
> A: It has never changed. It was that the day it happened, it was that the day I signed the affidavit, and it is true today.

(VI R. 15-16.)

Again, on cross examination, Dixie's counsel unequivocally stated her reason for excluding the potential jurors.

> Q: It's your testimony that you don't have any specific recollection of why you excluded the jurors that you excluded, is that a fair statement?
>
> A: It was eyeball contact. *I can tell you that for sure*, and in the eyeball contact, they either weren't looking at me or they were looking

> at me and I thought they were not listening to me when I had eyeball contact.

(VI R. 20.) (Emphasis added.) The fact that Dixie's counsel places great weight on eye contact is evidenced in the following statement made during voir dire, "Good morning, I'm going to ask you some questions, and when I do, I need you to *open your eyes up* and raise your hand. . . . " (IV R. 21.) (Emphasis added.)

While testifying that eye contact was the primary reason for striking the potential jurors, counsel also offered secondary reasons in support of these peremptory strikes. Notes of co-counsel from the trial revealed that one of the jurors struck was an insurance clerk for a company that wrote fire insurance policies. As testified to at the hearing, it is standard practice for Dixie's counsel to excuse members of any industry that is affiliated with the case being tried. Thus, because this case actually involved questions of coverage on an automobile policy following the destruction of the vehicle by fire, counsel testified that this juror would have been stricken under this practice. As stated at the hearing, "I would not want someone who comes into the room with barrels of expertise that would have an impact on tainting the entire jury. . . . " (VI R. 17-18.)

Co-counsel's notes showed the other black panel member at issue to be unemployed. Again, counsel for Dixie testified that striking this juror would have been consistent with her usual practice of striking any potential juror who is unemployed. (VI R. 10.) That the white member of the venire struck was also unemployed reiterates the testimony on this issue.

On page 3 of their Statement of the Case, the Polks state, "The insurance company bolstered racial aspects of the case by asking Polk about his illegitimate children." It should be noted that it was counsel for the Polks who initially addressed the issue of race. (IV R. 19.) In fact, nowhere in the record does counsel for Dixie state or insinuate that the race of the plaintiffs or jurors was of any concern. The line of questioning regarding Polk's children related directly to Polk's motive for driving home on the night of the alleged accident instead of staying at the home of his girlfriend – such motive having been placed in issue as a result of Petitioners' counsel's direct examination of James Polk.

Finally, perhaps because it does not comport with their argument that they were unable to rebut Dixie's counsel's articulated reasons, Petitioners failed to mention in their Statement of the Case that they actually called a rebuttal witness at the hearing. (VI R. 22-24.)

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

This petition should be denied because of Petitioners' failure to file and serve a proper petition within the ninety days allowed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13. The improper petition filed within the ninety-day time period was not served on Respondent Dixie Insurance Company and was rejected by the Clerk of the Supreme Court for not meeting the printing requirements of the Supreme Court Rules and for not being accompanied by a motion to proceed *in*

forma pauperis. The failure to timely file the petition divests the Court of jurisdiction to consider same. Alternatively, even if the improper petition filed within the ninety days meets the jurisdictional requirements, Petitioners' intentional disregard of this Court's procedural guidelines justifies the denial of the petition in this case.

Contrary to Petitioners' arguments, the Fifth Circuit's decision in this case is consistent with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Counsel's articulated reasons were related to the particular case to be tried even though, because over three years had passed since the voir dire in this case, specific details could not be recalled. Additionally, *Batson's* requirement that the reasons be "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, was met. Petitioners' argument that the reasons stated did not allow a rebuttal is inconsistent with their extensive cross-examination of Dixie's counsel and their actually calling a rebuttal witness at the hearing on remand. Further, Petitioners' assertion that peremptory strikes should be abolished to fulfill their "right to have blacks on a jury" is inconsistent with prior rulings of this Court. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), *quoted in Holland v. Illinois*, 493 U.S. 474, 483 (1990), *reh'g denied*, 494 U.S. 1050 (1990). The Fifth Circuit, in affirming the findings of the trial court, was merely following the standards for appellate review established by this Court in *Batson* and *Hernandez v. New York*, 111 S. Ct. 1859 (1991).

The Fifth Circuit's opinion is also consistent with other circuit courts' decisions involving similar facts. As to the failure of Dixie's counsel to recall specific details, the Fifth Circuit relied on decisions rendered by the

Eighth Circuit, *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989), and *United States v. Wilson*, 867 F.2d 486 (8th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989). The facts in these cases more closely resemble the facts in this case than the one Third Circuit case cited by Petitioners, *Harrison v. Ryan*, 909 F.2d 84 (3rd Cir. 1990), *cert. denied sub nom. Castille v. Harrison*, 111 S. Ct. 568 (1990), or the cited district court opinion, *United States v. Cunningham*, 713 F. Supp. 165 (M.D.N.C. 1988).

The Fifth Circuit's upholding of the finding of no discrimination based on the stated reason of eye contact is not only consistent with the one case cited by Petitioners on this issue, *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990) *reh'g denied*, 920 F.2d 13, (11th Cir. 1990), *cert. denied sub nom. Barfield v. Lamar*, 111 S. Ct. 2263 (1991), but it is also consistent with decisions rendered in the Third, Seventh, and Eighth Circuits. *United States v. Casper*, 956 F.2d 416 (3rd Cir. 1992); *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121 (7th Cir. 1992); *United States v. Swinney*, 970 F.2d 494 (8th Cir. 1992), *cert. denied*, No. 92-6413, 1992 WL 331988 (U.S. Nov. 30, 1992); *United States v. Todd*, 963 F.2d 207 (8th Cir. 1992); *Reynolds v. Benefield*, 931 F.2d 506 (8th Cir. 1991); *United States v. Sherrills*, 929 F.2d 393 (8th Cir. 1991).

Finally, this case is not unique in finding no discrimination even though all minority members were stricken. *See Dunham*, 967 F.2d at 1122; *Reynolds*, 931 F.2d at 508; *Barfield*, 911 F.2d at 646. The two Fifth Circuit cases cited by Petitioners on this issue, *Moore v. Keller Indus.*, 948 F.2d 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1945 (1992), and *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988), do not, of course, show a conflict between circuit

courts on this issue. Petitioners mischaracterize the holdings in the other two cases cited, *United States v. Chincilla*, 874 F.2d 695 (9th Cir. 1989), and *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), *reh'g denied*, 490 U.S. 1014 (1989). In fact, *Roman* is not even a case in which all members of a particular race were excluded from the jury. Nevertheless, none of these cases mandate a finding of discrimination merely because all minority members of the jury panel were stricken.

Because Petitioners failed to timely file and serve a proper petition and because they cannot show a conflict between the Fifth Circuit's decision in this case and either this Court's precedents or the decisions of other circuit courts, the petition for a writ of certiorari in this case should be denied.

ARGUMENT FOR DENYING THE PETITION

I. Petitioners failed to properly file and serve their petition for writ of certiorari within the prescribed ninety-day time period.

Judgment was entered by the United States Court of Appeals for the Fifth Circuit in this case on August 4, 1992. Accordingly, pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 12 and 13, a petition for writ of certiorari should have been filed with proof of service by November 2, 1992. This did not take place. Not until November 13, 1992, did Dixie Insurance Company receive a copy of the Polks' petition in this matter. The letter to the Clerk of the Supreme Court which accompanied the

petition was dated November 11, 1992, and stated, "Consistent with my certificate of service, I am today forwarding a true and correct copy of the Petition to opposing counsel." Clearly, Dixie was not served until after the deadline for the Polks' petition. Furthermore, proper copies of the petition were not filed until after the deadline.

Apparently, some form of a petition was filed on October 29, 1992. The petition filed at that time was rejected by the Clerk of the Supreme Court because no motion to proceed *in forma pauperis* in order to be exempt from the printing requirements of the Supreme Court Rules accompanied the improper petition. Furthermore, Dixie was not served with a copy of this petition. Again, it was not until November 13, 1992, after the prescribed ninety days had passed, that Dixie first learned of the Polks' decision to seek a writ of certiorari in this case.

The Polks proceeded in a similar fashion when seeking a writ previously in this case. An earlier opinion from the Fifth Circuit, *Polk v. Dixie Ins. Co.*, 897 F.2d 1346 (5th Cir. 1990), was entered on April 11, 1990. On July 9, 1990, the Petitioners filed a petition for a writ of certiorari which did not comply with the printing requirements of the rules of this Court. By letter dated July 12, 1990, the Clerk of Court advised the Petitioners' attorney that the petition must be corrected and that upon receipt of a corrected petition, it would be filed as of the date of the original petition. The corrected petition was not received by the Clerk until August 6, 1990.

Obviously, the theory of counsel for the Petitioners is to file something – *anything* – in this Court, regardless of

whether it sufficiently meets the requirements of the Supreme Court Rules, and then proceed at his leisure in filing proper copies of the petition. Absolutely no excuse was given for failing to follow the procedural guidelines established by this Court. Because counsel for the Polks has brought this same case before this Court previously and was at that time directed by the Clerk as to the proper requirements, he certainly cannot claim ignorance or inexperience. Rather, the previous incident serves only to illustrate his desire to take advantage of the Clerk's earlier generosity. To allow such flagrant disregard of the Court's procedural rules violates the very purpose of the rules and hinders the efficient administration of justice.

As stated in *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32, 32-33 (1966), *reh'g denied*, 385 U.S. 995 (1966):

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

Because the Polks failed to properly file and serve their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit within the prescribed ninety days as set forth in 28 U.S.C. § 2101(c) and Supreme Court Rule 13, proper jurisdiction is lacking in this case. Alternatively, even if the filing of some form of

a petition on October 29, 1992, meets the jurisdictional requirements, the lack of timely service upon the opposing party and proof of same, as required by Supreme Court Rules 12.1 and 29, and the failure to timely file proper copies and a docket fee, as required by Supreme Court Rules 12.1 and 33, or a motion seeking to proceed *in forma pauperis* as provided under Supreme Court Rule 39, justify a denial of the Polks' petition under the circumstances of this case.

II. The Fifth Circuit's opinion is consistent with this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Hernandez v. New York*, 111 S. Ct. 1859 (1991).

Petitioners attempt to persuade this Court to grant their petition by arguing that the Fifth Circuit's opinion conflicts with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Their first argument is that Dixie's counsel failed to articulate a neutral explanation "related to the particular case to be tried." *Batson*, 476 U.S. at 98.[1]

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[1] Petitioners do not argue that the reasons articulated by Dixie's counsel were not racially neutral. A plurality of this Court stated in *Hernandez v. New York*, 111 S. Ct. 1859, 1866 (1991):

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Clearly, the reasons articulated by Dixie's counsel – eye contact and employment status – meet this standard.

While it is true that counsel stated she could not remember the specific details surrounding the striking of the jurors in this case, especially since over three years had passed and the controlling law at the time required no reasons to be given, she stated unequivocally that her primary reason was eyeball contact. She was certain that this was the reason for striking these particular jurors because that is always the basis for her use of peremptory strikes. In addition, counsel offered secondary reasons for striking each of the potential jurors. One was unemployed and one worked for an insurance company. Because counsel for Dixie prefers jurors who are employed, but not within the same industry as the party she represents, she stated that these were additional reasons for striking the panel members at issue. Clearly, counsel's stated reasons did relate to the particular case to be tried and were, thus, in conformity with *Batson's* mandates.

Petitioners next argue that the Fifth Circuit failed to follow *"Batson's* incorporation of the standard of" *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), *cited in Batson,* 476 U.S. at 98 n.20. Petitioners argue that the race-neutral reasons articulated in this case were not "clear and reasonably specific," as required by *Batson,* 476 U.S. at 98 n.20, since they were not precise enough to provide a target upon which to focus a rebuttal. While *Burdine,* within the Title VII context, does mention "the necessity of rebutting the inference of discrimination arising from the prima facie case," *Burdine,* 450 U.S. at 258, this language clearly refers to the role of those *accused* of discrimination, not the accusers. As for those claiming discrimination, *Burdine* merely states that they are to "be

afforded 'a full and fair opportunity' to demonstrate pretext." *Burdine*, 450 U.S. at 258. Such an opportunity was afforded the Polks at the hearing on this matter. In fact, Petitioners' argument that they could not properly rebut the reasons articulated in this case is particularly puzzling in light of the extensive cross-examination conducted by Petitioners' counsel as well as their actually calling a rebuttal witness at the hearing. (VI R. 22-24.) Perhaps their complaint is not so much that they could not "make a rebuttal," but that their rebuttal was unsuccessful.[2]

Petitioners go so far as to argue that the Fifth Circuit's decision in this case renders *Batson* illusory and that "only the elimination of peremptory challenges will suffice to afford black citizens the right to have blacks on a jury." Petition at 7. The importance of peremptory strikes, however, has consistently been recognized by this Court. *See, e.g., Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) (noting "the contribution of the peremptory challenge to the administration of justice"). Furthermore, this Court has recognized that although potential jurors may

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[2] In light of Petitioners' complaint that the articulated reasons in this case were subjective, as discussed more fully in Part III of the Argument for Denying the Petition, it should also be noted that the Court in *Burdine*, which is relied on so heavily by Petitioners, actually criticized the Fifth Circuit for placing too heavy a burden on a defendant in a Title VII case. *Burdine*, 450 U.S. at 256-58. The court stated further, "The Court of Appeals also *erred in requiring the defendant to prove by objective evidence* that the person hired or promoted was more qualified than the plaintiff." *Burdine*, 450 U.S. at 258 (emphasis added).

not be excluded merely because of their race, "[d]efendants are not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), *quoted in Holland v. Illinois*, 493 U.S. 474, 483 (1990), *reh'g denied*, 494 U.S. 1050 (1990). Thus, Petitioners' assertions are inconsistent with prior rulings of this Court.

In truth, Petitioners' request for a writ of certiorari in this case, as with their reasons for an appeal to the Fifth Circuit, is based not on a legal question which needs to be resolved, but on their disagreement with the district court's finding that Dixie's counsel's stated reasons were credible and were not racially motivated. Such is not the basis for either a reversal by an appellate court or the granting of a petition for a writ of certiorari by this Court.

This Court recognized in *Batson* that "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21. More recently, the Court stated:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez v. New York, 111 S. Ct. 1859, 1869 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

The district court, at the hearing on remand in this case, found that the reasons articulated by counsel for Dixie were credible and were not racially motivated. The Fifth Circuit, recognizing the standard of review outlined in *Hernandez*, found as follows:

> Whether the striking party was or was not motivated by its proffered explanation is a fact-intensive question which must be decided case by case in light of the totality of circumstances. We cannot say that eye contact necessarily is a phony reason when it is proffered as justification for removal of all black jurors. On the record in this case, the trial court's conclusion that Dixie's counsel was not motivated by racial consideration is a permissible view of the evidence.

Polk v. Dixie Ins. Co., 972 F.2d 83, 86 (1992).[3]

Because the Fifth Circuit's decision in this case is consistent, contrary to Petitioners' assertions otherwise, with this Court's opinions in *Batson v. Kentucky* and *Hernandez v. New York*, the petition for a writ of certiorari should be denied.

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[3] The Polks, in their Reply Brief filed with the Fifth Circuit, actually argued that the appellate court should grant oral argument in this case in order to review the demeanor of Dixie's counsel for themselves. Reply Brief of the Appellants at 11-12. Even assuming that the same attorney would present the appellate argument if such were required, this requested procedure, which is in direct contradiction of this Court's rulings in both *Batson* and *Hernandez*, would quite clearly invade the province of the trial court as well as place an unnecessary burden on the federal appellate courts.

III. The Fifth Circuit's opinion does not conflict with other circuit courts' holdings which are based on similar facts.

After arguing that the Fifth Circuit's opinion in this case is inconsistent with this Court's ruling in *Batson*, Petitioners next attempt to persuade this Court to grant their petition by arguing that the Fifth Circuit's decision conflicts with decisions reached in other circuits. A closer reading of the cases cited by Petitioners, however, reveals the inaccuracy of these arguments.

Petitioners first argue that the Fifth Circuit's affirmance of the district court's findings is inconsistent with the holding in *Harrison v. Ryan*, 909 F.2d 84 (3rd Cir. 1990), *cert. denied sub nom. Castille v. Harrison*, 111 S. Ct. 568 (1990). Petitioners also cite to a federal district court opinion, *United States v. Cunningham*, 713 F. Supp. 165 (M.D.N.C. 1988). In both of these cases, the district court found that the prosecutor was unable to sufficiently set forth non-racial reasons for exercising his peremptory strikes. Accordingly, because "[t]he district court's factual determinations, including issues of credibility, are entitled to great deference and are not to be overturned unless clearly erroneous," *Harrison*, 909 F.2d at 86, the appellate court affirmed the district court's findings in *Harrison*.

Furthermore, in both cases cited by Petitioners, the prosecutors could not recall anything regarding their reasons for striking certain panel members. While thinking the strikes *may* have been for various reasons, the prosecutors could never say with any certainty. As the Fifth Circuit correctly noted, when distinguishing the factual

situation presented in *Harrison*, "That is not the situation here. Dixie's counsel maintains that she must have relied on eyeball contact because she always does and may have relied on other race-neutral factors in line with guidelines she generally follows." *Polk*, 972 F.2d at 85.

In reaching its decision, the Fifth Circuit relied on two opinions from the Eighth Circuit in which the factual patterns were more like the case at hand than the facts presented in *Harrison*. In *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989), the court was presented with the following situation:

> Because the voir dire had taken place two years earlier and because he could not locate his notes made at the time, the prosecutor could not recall at the hearing the specific reasons why he utilized peremptory challenges against the three black venire members. Accordingly, the prosecutor presented a standard set of guidelines that he had used over several years to evaluate potential jurors.

Nicholson, 885 F.2d at 482. The Eighth Circuit Court of Appeals held, "Because we do not find the district court's finding clearly erroneous, we affirm its holding that the government's peremptory challenges were exercised in a constitutionally permissible manner." *Nicholson*, 885 F.2d at 483. *Accord United States v. Wilson*, 867 F.2d 486 (8th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989).

Unlike the uncertainty of the prosecutors in both *Harrison* and *Cunningham*, relied upon by Petitioners, counsel for Dixie was certain of her reasons for striking the panel members because of her general practice. Counsel stated at the hearing, "I can tell this Court *for sure* that

the element of eyeball contact is the turning factor in every decision I make in every case that I try." (VI R. 8.) (Emphasis added.) Again counsel stated, "It was eyeball contact. I can tell you that *for sure.*" (VI R. 20.) (Emphasis added.)

Based upon the facts presented and because of the great deference afforded to the trial court's findings, the Fifth Circuit, as the Eighth Circuit in *Nicholson* and *Wilson*, affirmed the decision of the district court. This decision is not in conflict with the Third Circuit's holding in *Harrison* but is simply based upon a different factual situation. In all the cases, the appellate court upheld the district court's initial decision.

Next, Petitioners argue that the Fifth Circuit's decision conflicts with the Eleventh Circuit's opinion in *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990), *reh'g denied*, 920 F.2d 13 (11th Cir. 1990), *cert. denied sub nom. Barfield v. Lamar*, 111 S. Ct. 2263 (1991), in upholding eyeball contact as a legitimate reason. To the contrary, the Fifth Circuit's decision in this case is in accord with the Eleventh Circuit's opinion. In *Barfield*, the counsel explained his striking of a panel member as follows:

> I felt that Ms. Sills was looking at me, and looking at my client, and looking at the Defendant's table with an expression that conveyed to me some hostility, and it was my gut feeling, based on her facial expression that she was likely to not be fair and impartial to the Sheriff. For that reason, I feel that we should strike her.

Barfield, 911 F.2d at 646.

This is almost identical to the following statement made by Dixie's counsel at the hearing on this matter:

> A: It was eyeball contact. I can tell you that for sure, and on the eyeball contact, they either weren't looking at me or they were looking at me and I thought they were not listening to me when I had eyeball contact. You know as well as I do that some people roll their eyes, look away, some people have a smirk on their face. That is the gut feeling that I have to react on when I am selecting jurors.

(VI R. 20.)

Petitioners assert that in *Barfield*, the court "differentiated using 'body language' as a reason for exclusion, from using 'eye contact' as a reason for exclusion." Petition at 6. This is a mischaracterization of the Eleventh Circuit's holding. The court did not differentiate between body language and eye contact. To the contrary, the court stated, "In *Fludd* this court noted that 'eye contact with members of the venire and their expressions in response' were matters attorneys 'often take into account in exercising their peremptory challenges,' and matters the trial court may consider in deciding *Batson* questions." *Barfield*, 911 F.2d at 648 (quoting *Fludd v. Dykes*, 863 F.2d 822, 829 n.6 (11th Cir. 1989), *reh'g denied*, 873 F.2d 300 (11th Cir 1989), *cert. denied sub nom. Tiller v. Fludd*, 493 U.S. 872 (1989)). While noting that sometimes there would be nothing more than counsel's statement to support such reasons, the court continued, "To some extent, however, that is true of *any* explanation offered by counsel. The credibility decision is for the trial judge." *Barfield*, 911 F.2d at 648 n.1. The court concluded, "We hold that the

explanation offered for challenging prospective juror Sills was not legally insufficient as a matter of law. Stated otherwise, if the explanation is credible – and we assume on this appeal that it is – it is sufficiently clear and specific to pass muster under *Batson*." *Barfield*, 911 F.2d at 648. Petitioners' reliance on *Barfield* as creating a conflict among the circuit courts sufficient for this Court to grant their petition is clearly misplaced.

Not only is the Fifth Circuit's opinion in this case consistent with the Eleventh Circuit's holdings in *Barfield* and *Fludd*, it is also in accordance with opinions rendered in the Third, Seventh, and Eighth Circuits in which subjective reasons such as eye contact, lack of attentiveness, or the general demeanor of a prospective juror were cited as valid non-racial uses of peremptory strikes.

In *United States v. Casper*, 956 F.2d 416, 418-19 (3rd Cir. 1992), the court stated that the reason need not "be 'quantifiable' to be race neutral," and cited with approval the Fifth Circuit's decision in *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (prosecutor's observation of eye contact and demeanor was significant and constituted neutral explanation of peremptory exclusion).

The Seventh Circuit, in *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121 (7th Cir. 1992), was faced with an argument similar to that of Petitioners in this case. Nevertheless, the court held as follows:

> Mr. Galvin's testimony was that his intuitive judgment was based not on Mrs. Mitchell's race, but on her demeanor in the courtroom, on her appearing to look in Mrs. Dunham's direction, rather than at the court or at the defendant or at

> Mr. Galvin. This Court has stated that "[a]dequate explanations for exercising a peremptory strike may include a prosecutor's 'intuitive assumptions that are not fairly quantifiable.' " *Williams v. Chrans*, 957 F.2d 487, 490 (7th Cir. 1992) (quoting *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991)) . . . . In the present case, Mr. Galvin's intuitive judgment was based on the juror's specific behavior and demeanor in the courtroom; it is "a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98 . . . .

Dunham, 967 F.2d at 1124-25. This court, too, cited to the Fifth Circuit opinion of *Lance*, 853 F.2d at 1181, in which eye contact was the stated reason.

Eye contact and demeanor have also been upheld as sufficient non-racial reasons in several cases from the Eighth Circuit. *See United States v. Swinney*, 970 F.2d 494, 496 (8th Cir. 1992) ("Government struck the second black juror because he wore dark sunglasses and 'a big gold watch' into the courtroom, and the prosecuting attorney was unable to establish eye contact with him"), *cert. denied*, No. 92-6413, 1992 WL 331988 (U.S. Nov. 30, 1992); *United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) ("venireperson . . . appeared inattentive, impatient, and hostile to the prosecutor"); *Reynolds v. Benefield*, 931 F.2d 506, 513 (8th Cir. 1991) (prospective juror "challenged because of the definite impression of the defendants that his facial expressions and body language indicated hostility"); *United States v. Sherrills*, 929 F.2d 393, 394 (8th Cir. 1991) ("prosecutor stated that she had challenged three of the blacks because they were inattentive").

In *Reynolds*, 931 F.2d at 512, the court made the following observation:

> It is well to note that feelings are not always expressed in words, and, indeed, may be clearly manifested by gestures and facial expressions. A grimace or stare may express hostility or displeasure quite as clearly as words shouted across a room. Much literature may be found on interpreting "body language" as a fundamental and effective practice in the selection of a jury. *See, e.g.*, 1 S. Schweitzer, *Cyclopedia of Trial Practice* § 144 (2d ed. 1970); 5 *Am.Jur.Trials* § 65 (1966) (valuable information can be obtained by observing a juror's demeanor). It has been noted that the "body language method" of jury selection "looks to a juror's appearance, behavior, and non-verbal responses, since these are viewed as giving a truer picture than verbal answers." T. Mauet, *Fundamentals of Trial Techniques* 32 (2d ed. 1988). It may also be relevant to note "the juror's attitude toward the lawyer." *Id.*

Petitioners' assertion that the Fifth Circuit's upholding of the neutral reason of eyeball contact for Dixie's use of peremptory strikes creates a conflict among the circuit courts is clearly without merit.

Finally, Petitioners argue that a writ should be granted in this case because the case is unique in excluding all members of a racial minority. However, courts have affirmed district courts' findings of no discrimination even when all minority members were stricken. *See, e.g., Dunham*, 967 F.2d at 1122; *Reynolds*, 931 F.2d at 508; *Barfield*, 911 F.2d at 646.

Interestingly, two of the cases cited by Petitioners are actually two earlier opinions from the Fifth Circuit. *Moore v. Keller Indus.*, 948 F.2d 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1945 (1992); *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988). Obviously, these two opinions cannot be used to argue a conflict between the Fifth Circuit and other United States circuit courts necessitating a writ of certiorari in this case. Furthermore, although the Fifth Circuit stated in these cases that the fact that all minorities were not stricken "substantially support[ed] the finding of no discrimination," *Moore*, 948 F.2d at 202, *Terrazas-Carrasco*, 861 F.2d at 95, the court did not state the reverse – that excluding all members of a minority group would automatically result in a finding of discrimination. When presented with that argument in this case, the Fifth Circuit refused "to establish such a per se rule." *Polk*, 972 F.2d at 86.

As for the other two cases cited by Petitioners on this issue, Petitioners misrepresent the decision of the court in each of these cases. Petitioners contend that the Ninth Circuit in *United States v. Chincilla*, 874 F.2d 695 (9th Cir. 1989), held that the "[f]act that all minority members were excluded from jury panel requires the court to disallow purely subjectively based challenges." Petition at 6. Nowhere in *Chincilla* is such a requirement mandated. The court's discussion of the fact that all minority members were excluded was within the framework of determining whether a prima facie case had been established – the first step in the *Batson* procedure. *Chincilla*, 874 F.2d at 698. Such is not a contested issue in this case. Furthermore, although the court in *Chincilla* did reject the reasons articulated by the prosecutor, there is no indication

that this rejection was based on the striking of all the minority members. Rather, the court found certain inconsistencies and weaknesses in the prosecutor's explanations. *Chincilla*, 874 F.2d at 698-99.

Petitioners' reliance on the Second Circuit's decision in *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), *reh'g denied*, 490 U.S. 1014 (1989), is an even greater enigma. Petitioners conclude from this case that "[g]eneral responses regarding 'lifestyle' and 'background' are inadequate when utilized to exclude all minority members." Petition at 6. The exclusion of all minority members, however, was not even an issue in this case. The defendant's argument was based on the prosecutor's striking of whites from the jury; nevertheless, the jury actually empaneled "consisted of three Whites and nine persons who were Black or Hispanic." *Roman*, 822 F.2d at 218. Consequently, this is not a case in which the exclusion of all minority panel members had any bearing whatsoever on the court's decision.

The Second Circuit in *Roman* merely upheld the lower court's decision that the various reasons given by the prosecutor were inadequate to rebut the prima facie case established by the defendant. The district court had "found that the reasons adduced by Levin [the prosecutor] for his challenges were circumlocutory, trivial, childish, incredible, and designed to cover up the ADA's discriminatory intent." *Roman*, 822 F.2d at 228. Because of the lower court's findings, the court stated as follows:

> The findings of the trial court are to be upheld on appeal unless they are clearly erroneous. Assessments of credibility of witnesses are peculiarly within the province of a trier of

> fact who has had an opportunity to view and hear the witnesses, and such assessments are entitled to considerable deference on review. Plainly the district court's decision to disbelieve the testimony of a witness who has appeared before it must be respected where the evidence adduced supports that decision.

Roman, 822 F.2d at 228 (citations omitted).

Because the Fifth Circuit's decision in this case does not conflict with decisions of other circuits, including those cited by Petitioners, the Polks' petition for a writ of certiorari should be denied.

CONCLUSION

Based on the foregoing discussion, Respondent Dixie Insurance Company respectfully requests this Court to deny the Polks' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Dixie Insurance Company,
Respondent

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